

of 1989 through 1994, inclusive, by operation and application of Section 95.011 and Section 95.11(3)(f), Florida Statutes (statute of limitations); and,

Whether the Department is legally and equitably precluded in this proceeding from taking agency action to enforce the reporting and fee provisions required pursuant to Chapter 252, Part II, Florida Statutes, against Respondent for the reporting years of 1989 through 1994, inclusive, by operation and application of Section 95.11(6), Florida Statutes (doctrine of laches).

PRELIMINARY STATEMENT

This matter began when the Department drafted and forwarded a Notice of Violation and Intent to Assess a late Fee ("Notice") to Goodson Paving, Inc., dated April 2, 1999. The Notice was received by Respondent on April 8, 1999. Upon receipt and review of the Notice, Respondent timely requested an administrative hearing to contest the application of the reporting and fee requirements for the years 1989 through 1994, inclusive. This matter was referred to the Division of Administrative Hearings on June 22, 1999. This matter proceeded on the Second Amended Petition for Administrative Proceedings.

Discovery was initiated and completed, and the formal hearing was held as scheduled.

Counsel for the parties filed a Pre-hearing Stipulation prior to the hearing. The only disputed issue of fact was

whether Respondent has a reportable quantity of an extremely hazardous substance during any reporting year from 1989-1998, and if so, for which reporting year(s). Official recognition of the statutes and case law requested by the parties was taken. Several facts were stipulated. At the hearing, the Department offered the testimony of Gregg Dawkins, the Administrator for the Compliance Planning Section for the Division of Emergency Management, Department of Community Affairs. Respondent offered the testimony of Tom Goodson, President of Goodson Paving, Inc. Respondent's Exhibits numbered 1-5 were offered and admitted without objection. Both parties were advised of their right to file a proposed recommended order within ten days of the filing of the transcript. The Transcript was filed with the Clerk of Division of Administrative Hearings on October 21, 1999. Both Petitioner and Respondent filed Proposed Recommended Orders on November 1, 1999.

Based on all of the evidence, the following findings of fact are determined.

FINDINGS OF FACT

1. The Florida Hazardous Materials Emergency Response and Community Right to Know Act (the Act), Part II, Chapter 252, Florida Statutes, was first passed in 1988.

2. The purpose of Act is to provide information to response personnel in an emergency regarding the type of chemicals and substances that might be present at a facility.

3. The outreach program conducted by the Department of disseminating information to facilities which potentially may be required to report was initiated in 1988 and continued into 1989. It included mass mailings to over 100,000 facilities; conduct of regional seminars, which were advertised in newspapers; establishment of an Internet site; publishing a how-to-comply handbook; and working with local communities and other state agencies.

4. There are approximately 15,000 to 16,000 active facilities reporting under various sections of the Act.

5. The Department did not contact Respondent during the outreach program.

6. Respondent has been located at 5855 Industrial Drive, Cocoa, Florida, since April 1989.

7. Respondent reported the following number of employees to the Florida Department of Labor and Employment Security for unemployment compensation tax purposes for the last month of each year, from 1989 through 1998:

1989	24
1990	22
1991	25
1992	30
1993	31
1994	35
1995	37
1996	40
1997	44
1998	45

8. Respondent is in the business of site contracting and road building/construction and uses diesel fuel which it stores

on-site for fueling its trucks and construction equipment. Respondent does not distribute the diesel fuel or offer it for retail sale.

9. The site located at 5855 Industrial Drive, Cocoa, Florida, has been an asphalt plant and road construction office since approximately 1949.

10. Respondent stores on-road diesel fuel and off-road diesel fuel at the site for self-use for completion of contracted projects.

11. The Brevard County Fire and Rescue Department performs annual inspection of Respondent's site at 5855 Industrial Drive, Cocoa, Florida, as well as inspection of the shop, the office, and the storage tanks.

12. Respondent has completed and filed the State of Florida Department of Environmental Protection Storage Tank Registration forms and the State of Florida Environmental Protection Plant Storage Tank System Inspection Report for every year of operation since at least 1991.

13. Respondent completed and filed the State of Florida Department of Environmental Protection Storage Tank Facility Compliance Inspection Report for the year 1999 on September 8, 1999.

14. Respondent received the State of Florida Department of Environmental Protection Storage Tank Placard issued in July of 1999 with an expiration date on June 30, 2000.

15. Respondent is in possession of the requisite State of Florida Storage Tank Third Party Liability and Corrective Action Policy Declarations with an effective date of January 1, 1999.

16. Respondent has maintained uninterrupted insurance for the on-site tanks since 1989.

17. Respondent pays a State of Florida Pollutant Tax on each gallon of diesel fuel purchased through its supplier, Coastal Refining and Marketing, Inc. The tax is collected by the supplier and remitted to the State of Florida.

18. The State of Florida Department of Environmental Protection Storage Tank Facility Compliance Inspection Reports are filed with the State of Florida Department of Environmental Protection in Tallahassee, Florida.

19. The Brevard County Fire and Rescue Department is aware and informed of the chemicals and type of operation located at Respondent's site at 5855 Industrial Drive, Cocoa, Florida.

20. The only chemicals possessed by Respondent at the site at 5855 Industrial Drive, Cocoa, Florida, are the aforementioned diesel fuel tanks, motor oil, hydraulic oil, and four one-gallon cans of paint.

21. Respondent does not manufacture asphalt or maintain liquid asphalt at the site at 5855 Industrial Drive, Cocoa, Florida.

22. Prior to receiving the April 2, 1999, Notice of Violation and Intent to Assess Late Fee, Respondent had not had contact with The Department.

23. Respondent has filed the requisite monthly reports to the State of Florida Department of Revenue and has paid the requisite road and fuel tax to the State of Florida Department of Revenue since incorporation.

24. Respondent, Goodson Paving, Inc., does have a current, valid Occupational License issued by Brevard County, Florida.

25. Respondent's diesel fuel storage containment system is built to the code issued by Brevard County and is approved by the Brevard County Inspectors each year.

26. Prior to receiving the April 2, 1999, Notice of Violation and Intent to Assess a Late Fee from the Department, Respondent, in the previous ten or eleven years, has had annual inspections conducted by the Brevard County Fire and Rescue Department and the other county inspectors; has paid taxes to the State of Florida Department of Revenue; and has had a valid Occupational License. Respondent was not informed of the obligation to report under Part II of Chapter 252, Florida Statutes.

27. On April 8, 1999, Respondent received the Department's Notice of Violation and Intent to Assess a Late Fee dated April 2, 1999.

28. Respondent timely requested an administrative hearing regarding the Department's April 2, 1999, Notice of Violation and Intent to Assess Late Fee, pursuant to Section 120.569, Florida Statutes, and implementing rules.

29. The staff of the Department's Division of Emergency Management Compliance Planning Section who administer the Emergency Planning and Community Right-to-Know Act (EPCRA) and the Act of 1988 are also responsible for assisting the Division's Emergency Operations Center during activations for disasters such as hurricanes or fires. During activations, the routine hazardous materials program duties are subservient to other Division of Emergency Management duties.

30. Respondent suffered no prejudice from the timing of the Department's April 1999 Notice of Violation and Intent to Assess a Late Fee since: (1) the annual inventory forms are required by federal law; (2) Respondent was able to complete the forms based upon available information; and (3) no interest, late fee, or other adverse financial impact will result if the annual fees are timely paid in response to the notice.

31. Respondent is responsible for the fee obligations under the statutes and rules for the years 1989-1998, in the total amount of \$832.50.

CONCLUSIONS OF LAW

32. The Division of Administrative Hearings has jurisdiction over the parties and subject matter. Sections 120.569 and 120.57, Florida Statutes.

33. Part II of Chapter 252, Florida Statutes, is known as the Florida Hazardous Materials Emergency Response and Community Right to Know Act of 1988. Pursuant to that Chapter, the Florida Legislature established a fee and reporting system and authorized the Department to adopt rules with respect to the fee system and also allowed the Department to assess a late fee under certain circumstances. The Department was charged with the responsibility to administer the program and staff the Florida State Emergency Response Commission.

34. Prior to the imposition of any late fee, the Department is required to notify the owner or operator of a facility of the requirements that have not been met and to provide notice of the intent to assess a late fee, pursuant to Section 252.85(4), Florida Statutes.

35. If the owner or operator of a facility responds to a Section 252.84(4), Florida Statutes, notification by filing the required reports and paying the required fees within 30 days of receipt, then no late fee may be assessed.

36. Goodson is a "person" as defined in 42 U.S.C. Section 11049(7).

37. Goodson operates a "facility" as defined in 42 U.S.C. Section 11049(4) and Section 252.82(4), Florida Statutes.

38. Diesel fuel is a "hazardous chemical" as defined in 29 C.F.R. Section 1910.1200(c).

39. The operator of a facility that has at or above the threshold planning quantity of a hazardous chemical during any calendar year must prepare and file an inventory form with the appropriate state emergency response commission, local emergency planning committee and local fire department on or before March 1 of the subsequent year pursuant to 42 U.S.C. Section 11022.

40. From 1988-1998, the threshold planning quantity established for diesel fuel was 10,000 pounds, pursuant to 42 U.S.C. Section 11021 and 40 C.F.R. Sections 370.40 and 370.41.

41. The Department has adopted Chapter 9G-14, Florida Administrative Code, to establish the reporting fees and due dates as required by Section 252.85, Florida Statutes.

42. The Department has the ultimate burden of persuasion in this proceeding to prove that Respondent is obligated to file the reports and pay the fees associated therewith for the reporting periods of 1989 through 1998, inclusive. Florida Department of Transportation v. J.W.C., Co., 396 So. 2d 778 (Fla. 1st DCA 1981).

43. Respondent has the burden to prove the statute of limitations, and laches defenses that it alleged in its Petition.

Florida Department of Transportation v. J.W.C., Co., supra at 779, Van Meter v. Kelly, 91 So. 2d 327 (Fla. 1956).

44. The Department is not legally precluded in this proceeding from taking Section 252.85(4), Florida Statutes, agency action to enforce the reporting and fee provisions in Chapter 252, Part II, Florida Statutes, as to Goodson for reporting years 1989 through 1994, by operation of Sections 95.011 and 95.11, Florida Statutes.

45. Section 95.011, Florida Statutes, "Applicability," provides:

A civil action or proceeding, called "action" in this chapter, including one brought by the state, a public officer, a political subdivision of the state, a municipality, a public corporation or body corporate, or any agency or officer of any of them, or any other governmental authority, shall be barred unless begun within the time prescribed elsewhere in these statutes.

46. Section 95.11, Florida Statutes, "Limitations Other than for Recovery of Real Property," provides in part:

Actions other than for the recovery of real property shall be commenced as follows: . . .
(3) WITHIN FOUR YEARS- (f) an action founded on a statutory liability.

47. The plain language of Section 95.011, Florida Statutes, "Applicability", refers to an "action" as a "civil action or proceeding." Accordingly, the statute should not be applied to preclude the Department from taking "agency action" as that phrase is defined in Section 120.52(2), Florida Statutes, the definitions section of the Administrative Procedures Act (APA).

48. While the APA uses the term "proceeding," there is nothing in either Chapter 95 or in the APA that suggests that Section 95.011, Florida Statutes, was enacted as limitation on proceedings intended to help formulate agency action. Section 95.011 was first enacted in Chapter 74-382, Section I, Laws of Florida (1974), the same year that the 1974 Legislature enacted the APA. Chapter 74-310, Laws of Florida (1974), Section 120.57 was said to apply "in all proceedings, in which the substantial interest of a party are determined by an agency." A "civil action or proceeding," in contrast, refers to a judicial remedy.

49. If the phrase "civil action or proceeding" were intended to include both judicial and administrative proceedings, then the Legislature would not have used the term "administrative" to modify "proceedings" in enactment of the Florida Equal Access to Justice Act, Section 57.111, Florida Statutes. The Act uses the phrase "civil actions and administrative proceedings." Section 57.111(2), Florida Statutes (1999) (emphasis supplied).

50. Likewise, in the Florida Governmental Conflict Resolution Act, Sections 164.101-164.1061, Florida Statutes, the Legislature clearly differentiated between "court proceedings" and "administrative proceedings." E.g., Section 164.1041(1), Florida Statutes (1999).

51. Mercy Hospital v. Department of Professional Regulation, Bd. Of Medial Examiners, 467 So. 2d 1058, 1060 (Fla.

3d DCA 1985), involved a hospital's appeal of a circuit court order that enforced two administrative subpoenas seeking medical records. The hospital claimed that the records were privileged and did not comply with the subpoenas. The Department successfully petitioned the circuit court for enforcement pursuant to Sections 120.58 and 120.69, Florida Statutes. The District Court rejected the hospital's argument that Section 768.40(4), Florida Statutes (1983), conferred protection since the statute applied "in any civil action." The Court distinguished an "administrative disciplinary investigation" from a "civil action" and relied upon a Maryland case that distinguished "administrative disciplinary proceedings" generally from "civil actions." Id., citing Unnamed Physician v. Commission on Medical Discipline, 285 Md. 1, 400 A.2d 396, cert. denied, 444 U.S. 868 100 S.Ct. 142, 62 L.Ed.2d 92 (1979).

52. Florida courts have failed to consider whether administrative proceedings are included in the definition of "action" in Section 95.011, Florida Statutes. Instead, the courts have ruled that statutes of limitation are not applicable in administrative enforcement proceedings brought in the name of the State, in the absence of contrary legislative intent. Ong v. Department of Professional Regulation, 565 So. 2d 1384, 1386 (Fla. 5th DCA 1990)[appeal of Final Order suspending dentist's license and imposing fine and reprimand]; Farzad v. Department of Professional Regulation, 443 So. 2d 373, 375 (Fla. 1st DCA 1983)

(appeal of Final Order imposing reprimand on physician);
Landes v. Department of Professional Regulation, 441 So. 2d 686
(Fla. 2nd DCA 1983), rev. denied, 451 So. 2d 849 (Fla. 1984)
(appeal of Final Order revoking real estate license and
registration pursuant to Chapter 475, Florida Statutes);
Donaldson v. State Department of Health and Rehabilitative
Services, 425 So. 2d 145 (Fla. 1st DCA 1983) (appeal of Final
Order suspending license to sell hearing aids and imposing fine).

53. There is no case holding that Section 95.11(3), Florida Statutes, is a bar to any "agency action" under the APA, generally, nor to the Department's instant action to provide Respondent with written notice of violation of the fee and reporting requirements and of the agency's intent to assess a late fee pursuant to Section 252.85(4), Florida Statutes, if the reports and fees are not timely submitted.

54. Even assuming arguendo, that the term "proceeding" in Section 95.11(3), Florida Statutes, includes Section 120.57, Florida Statutes, proceedings, the courts have determined that the statute of limitation is inapplicable to administrative enforcement proceedings to protect the public health, safety, and welfare.

55. The Department's proposed agency action that is challenged herein seeks to require Respondent to file overdue annual reports and to pay overdue annual registration fees. Section 252.85, Florida Statutes. The proposed agency action

also serves as a necessary predicate for the imposition of late fees if Respondent fails to timely file the overdue annual reports and pay the overdue annual registration fees after receipt of notice. Section 252.85(4), Florida Statutes. Thus, the Department has placed Respondent on notice that the corporation has violated the reporting requirements and that failure to timely submit the reports will result in an adverse financial impact, "a late fee."

56. The Department's action at issue in this proceeding could result in an action that is "penal in nature" in that it may serve to deprive Respondent of property--money required to pay late fees. Thus, while the Department's action does not involve the imposition of professional licensee discipline, this proceeding is more similar to such proceedings than it is to a license application proceeding. Department of Banking and Finance, Div. Of Securities and Investor Protection v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996).

57. In Latham v. Florida Com'n on Ethics, 694 So 2d 83, 85 (Fla. 1st DCA 1997) rev. dismissed, 719 So. 2d 287 (Fla. 1998), the Court considered whether administrative proceedings before the Commission on Ethics are penal in nature for the purposes of determining the proper standard of proof. The Commission's Final Order finding that a public officer had violated Section 112.313(6), Florida Statutes, was entered following a formal hearing at the Division of Administrative Hearings. On appeal,

the Court reversed the Final Order because the Commission had applied the "preponderance of the evidence" standard instead of the "clear and convincing evidence" standard. Based upon consideration of Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern & Co., supra, the Court rejected the Commission's claim that the proceeding was not penal in nature even though the Commission only reports findings and recommendations to "the proper disciplinary official," who then takes action based upon the Commission's report.

58. Section 252.85(4), Florida Statutes, provides an exclusive listing of "limitations" on The Department's authority to impose a late fee. The list of limitations does not include any statute of limitations. A more specific statute covering a particular subject governs over a general statute. McKendry v. State, 641 So. 2d 45, 46 (Fla. 1994).

59. During its statutory review of Chapter 252, Part II, Florida Statutes, the 1996 Legislature granted a conditional waiver of past due annual fees. Section 2 of Chapter 96-308, Laws of Florida (1996) provides:

[a]ny owner or operator of a facility which is required to register, report, and pay fees under Part II of this chapter, but which has not complied as of October 1, 1996, will be granted a waiver of the past due annual fees, if the owner or operator registers and reports between October 1, 1996, and December 31, 1996. This fee waiver only applies to first time, self-reporters and does not apply to facilities that have been

noticed by the Department of Community Affairs for failure to report prior to October 1, 1996.

See statutory notes to Section 252.85, Florida Statutes (1995), and Section 252.85, Florida Statutes (Supp. 1996).

60. If the four-year statute of limitations applied, then the 1996 waiver provision would, in part, be unnecessary. For example, a facility owner who was responsible, but had failed to comply, only for reporting years 1989-1991, would not need a waiver if the statute of limitations applied. A fundamental rule of statutory construction requires courts to avoid reading statutes so as to render any part meaningless. Unruh v. State, 669 So. 2d 242 (Fla. 1996).

61. The cases cited by Respondent to support its statute of limitations and laches defenses are inapposite. Each of the cases is readily distinguishable since it does not involve the State's attempting to defend an exercise of its police power in an administrative hearing. Putman Berkley Group, Inc. v. Dinin, 734 So. 2d 532 (Fla. 4th DCA 1999); Hullinger v. Ryder Truck Rental, Inc., 548 So. 2d 231 (Fla. 1989); Scott v. Otis Elevator Co., 524 So. 2d 642 (Fla. 1988); Associated Coca Cola, et al. v. Special Disability Trust Fund, 508 So. 2d 1305 (Fla. 1st DCA 1987); and Van Dussen v. Southeast First Nat'l Bank of Miami, 478 So. 2d 82 (Fla. 3d DCA 1985).

62. Section 95.11(6), Florida Statutes (Supp. 1998), provides:

LACHES.-Laches shall bar any action unless it is commenced within the time provided for legal actions concerning the same subject matter regardless of lack of knowledge by the person sought to be held liable that the person alleging liability would assert his or her rights and whether the person sought to be held liable is injured or prejudiced by the delay. This subsection shall not affect application of laches at an earlier time in accordance with law.

63. Section 95.11(6), Florida Statutes, -- the defense of statutory laches -- is inapplicable to this proceeding since this is not an action in equity. Corinthian Investments, Inc. v. Reeder, 555 So. 2d 871, 874-875 (Fla. 2nd DCA 1989), rev. denied 563 So. 2d 631 (Fla. 1990); Cook v. Central and Southern Fla. Flood Control Dist., 114 So. 2d 691, 693 (Fla. 2nd DCA 1959).

64. Notwithstanding the obvious application of laches in equitable instead of legal actions, the doctrine has arisen in administrative proceedings. In Devine v. Department of Professional Regulation, Bd. Of Dentistry, 461 So. 2d 994 (Fla. 1st DCA 1984), a dentist-applicant appealed a Final Order that dismissed his challenge to the scoring of his dental practice examination. The examinations were administered in 1974, 1975, 1976 and 1978. The applicant filed a petition in 1981 and he challenged the 1976 examination score. The agency routinely destroyed the records in 1978 and as a result the applicant was unable to offer them into evidence. The hearing officer held that the doctrine of laches and/or equitable estoppel barred the challenge and the Court stated that it found "no error" in that

order. The Court held that the doctrine of laches was properly applied, distinguishing its decision in Farzad v. Department of Professional Regulation, 443 So. 2d 373 (Fla. 1st DCA 1983). The Court stated that the policy for rejecting laches as a defense to "proceedings conducted by the sovereign to protect the public" supported the application of laches with respect to protecting the public from unqualified professionals. Devine v. Department of Professional Regulation, Board of Dentistry, supra at 997.

65. In Farzad v. Department of Professional Regulation, 443 So. 2d 373 (Fla. 1st DCA 1983), the Court noted that the doctrine of laches "usually utilized in equitable proceedings, is . . . inapplicable to this administrative license revocation proceeding."

66. To the extent that the four elements of laches are applicable to the instant proceeding, they can be stated as follows: (1) starting with reporting year 1989, Respondent had a reportable quantity of diesel fuel under EPCRA and the Florida Hazardous Materials Emergency Response and Community Right-to-Know Act of 1988, but Respondent failed to file the required reports and to pay the required registration fees; (2) The Department gained access to the Florida Department of Environmental Protection's storage tank inventory database sometime in the past few years which included an entry for Goodson Paving, Inc.; (3) Respondent did not know that the Department intended to enforce the registration and fee

requirements until April, 1999; and (4) Respondent is not prejudiced by this proceeding since Respondent is obligated to file the required reports under the EPCRA and each day that the reports are late is a continuing violation, and no late fee can be assessed if Respondent files the reports and pays the required fees (without interest) within thirty days of the final order in this proceeding. Sections 252.85 and 252.86, Florida Statutes.

67. Section 252.86(3), Florida Statutes, authorizes the Department to bring a "cause of action" and seek to impose "civil penalties" in a Florida circuit court for any violation that is actionable under EPCRA Sections 325 or 326.

68. Goodson's failure to file annual reports required by EPCRA Section 312 is actionable under EPCRA Section 325(c)(1). Each day that an annual report is overdue constitutes a separate violation. EPCRA Section 325(c)(3). The civil penalty for each violation is not to exceed \$25,000 for each violation. EPCRA Section 325(c)(2).

69. The Legislature has given the Department the option to enforce the annual reporting requirements in two ways. On the one hand, the Department may bring an action in circuit court to impose civil penalties of up to \$25,000 for each day that a report is late without the necessity of any notice to the facility owner or operator. On the other hand, the Department may provide written notice(s) to the owner or operator of the overdue report and subsequently render an order that imposes late

fee(s). All fees and civil penalties collected under either option are earmarked for the same trust fund to ensure that the State program is self-sustaining. Section 252.84, Florida Statutes.

70. Since each day that a report is overdue is a separate violation, the Department could seek civil penalties in circuit court against Goodson for each annual report for the years 1989 through 1998, inclusive, and neither the statute of limitations nor laches would serve to bar such an action.

71. Accordingly, it would be absurd for the Legislature to have intended to bar the assessment of late fees beyond a four-year period from the date that a report was late since no such limitation would be imposed on the much harsher civil penalty provisions authorized by the same statute.

72. The Department is not legally precluded in this proceeding from taking Section 252.85(4), Florida Statutes, agency action to enforce the reporting and fee provisions in Chapter 252, Part II, Florida Statutes, as to Respondent for reporting years 1989 through 1994, by operation of Section 95.11(6), Florida Statutes, the statutory laches provision.

RECOMMENDATION

That the Secretary of the Department of Community Affairs enter a final order which holds that:

1. Respondent is responsible for reporting diesel fuel in excess of the threshold planning quantity pursuant to 42 U.S.C.

Section 11022 and Sections 252.85 and 252.87, Florida Statutes, for the years 1989-1998 inclusive; and for the fee obligations under Section 252.85, Florida Statutes, and Rule 9G-14.003(3), Florida Administrative Code, for the reporting years 1989-1998, inclusive.

2. Respondent owes the Department annual registration fees totaling \$832.50 if the reports and fees are submitted within thirty days of the Department's final order in this matter.

3. Respondent can be assessed additional late fees if all required reports, fees, and late fees are not timely paid, in accordance with Section 252.85(4)(b)3, Florida Statutes.

DONE AND ENTERED this 1st day of December, 1999, in Tallahassee, Leon County, Florida.

DANIEL M. KILBRIDE
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Filed with the Clerk of the
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this 1st day of December, 1999.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order must be filed with the agency that will issue the Final Order in this case.